IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 488 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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JYOTIBEN D/O BHIKHUBHAI PATEL AND
RAMANBHAI PATEL'S DIVORCED WIFE

Versus

RAMANBHAI DAYABHAI PATEL

Appearance:
MR RR MARSHALL for Petitioner No. 1
MR CB DASTOOR for Respondent No. 1
MR KALPESH M PANDIT for Respondent No. 1
MR SS PATEL, PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 31/07/2001

ORAL JUDGEMENT

#. This revision challenges the order of the Additional Sessions Judge, Valsad dated 10-10-2000.

#. The facts giving rise to this revision are that the revisionist moved an application under sec.97 of the Code of Criminal Procedure before the Judicial Magistrate, Valsad, praying to issue search warrant under sec.97 of the Code of Criminal Procedure against the respondent, the divorced husband of the revisionist and to grant custody of the minor Vatsal aged about 4 years and minor Khyati aged about 2 years as they were on the date of filing of this Criminal Revision. The said application was allowed by the Judicial Magistrate, Valsad. However, a revision was filed by the respondent, which was allowed and the order of the Judicial Magistrate was quashed and set aside. The instant revision is directed against this order.

#. Shri RR Marshall, learned counsel for the revisionist, Shri CB Dastoor, learned counsel for the respondent no.1 and Shri SS Patel, learned APP for the respondent no.2 have been heard.

#. A preliminary objection is raised by Shri Dastoor that the revision is incompetent, because no search warrant could be issued by the learned Magistrate under sec.97 of the Code of Criminal Procedure. In support of his contention he places reliance upon the Apex Court's verdict in RAMESH v. LAXMI BAI 1999 CRI.L.J. 5023. In para-4 of this judgment, the Apex Court has categorically held that sec.97 of the Code of Criminal Procedure, on identical facts, is not attracted to the facts and circumstances of the case when the child was living with his own father.

#. Sec.97 of the Code of Criminal Procedure clearly provides that, if any District Magistrate, Sub-Divisional Magistrate or Magistrate of First Class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant. It is, thus, clear from this provision that search warrant under sec.97 of the Code of Criminal Procedure can be issued only when it is found that the confinement amounts to an offence. The children were initially in custody of the father when application was moved before the Judicial Magistrate. Custody with the father can not be said to be an offence within the ambit of sec.97 of the Code of Criminal Procedure or any of the provisions of the Indian Penal Code. Thus sec.97 of the Code is not attracted and the order of the Magistrate was patently illegal, which was

rightly quashed and set aside by the Additional Sessions Judge.

#. Shri RR Mashal, at this stage, points out that he is not on technicality, whether sec.97 is applicable or not and he has no reason to distinguish the Apex Court's verdict in Ramesh v. Laxmi Bai (supra). He, however, suggests that the revisionist is ready to approach the appropriate Court under Guardians and Wards Act within a period of four weeks by filing appropriate application and also by filing application seeking interim custody from the said Court, and during this period of four weeks, interim order which was passed by this Court on 14-12-2000 be maintained. To this suggestion, Shri Dastoor has serious objection and he has pointed out and argued that, even the Supreme Court in Ramesh v. Laxmi Bai (supra) did not indicate such action, nor any interim order was passed by the Apex Court. His contention has been, either the revision should be dismissed or it may be withdrawn on the request of Shri Marshall and that the interim order for interim custody will automatically be lifted the moment the revision is dismissed or withdrawn. Shri Marshall points out that it is not the right of the parties which is to be determined, but the paramount consideration is the welfare of the children. He points out that the daughter is still below five years and the son was also below five years when revision application was moved and also when application for search warrant was moved, and in such circumstances, if interim order passed by this Court on 14-12-2000 is continued for a limited period, there will be no prejudice to the respondent. This suggestion is also not acceptable to Shri Dastoor. Considering the aforesaid facts and circumstances, it is clear that proceedings under sec.97 of the Code of Criminal Procedure were incompetent, and as such, the order passed by the Magistrate was rightly set aside by the Additional Sessions Judge, Valsad.

#. The revision, in these circumstances, is incompetent and it has to be dismissed and is hereby dismissed. However, before parting with this judgment, it is necessary to pass suitable orders keeping in view the paramount welfare of the minor children. The revisionist is directed to move an application before the competent Court under Guardians and Wards Act within a period of two weeks from today and shall simultaneously move an application for interim custody of the minors. The application for interim custody shall be disposed of by the competent Court within a period of two weeks from the date of moving of the application. While deciding application for interim custody, the competent Court will

not be guided or influenced by any of the observations made by this Court in the aforesaid paragraphs of this judgment. The interim order dated 14-12-2000 is, therefore, extended upto August 31, 2001.

#. This order is passed keeping in view the fact that, even in those cases where special civil applications are dismissed on merits, interim orders are extended to enable the parties to approach the higher forum. Keeping in view this practise, the interim order passed on 14-12-2000 is extended accordingly upto August 31, 2001.

#. At this stage, Shri Dastoor requests that operation of this order be stayed for a period of four weeks to enable him to approach the Apex Court. The request is declined.

July 31, 2001. (D.C. Srivastava, J.)

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